Filed 2/2/05 P. v. Marzec CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK MARZEC,

Defendant and Appellant.

2d Crim. No. B171884
(Super. Ct. No. VA073656-01)
(Los Angeles County)

Appellant Frank Marzec was tried before a jury and convicted of several sexual offenses and one charge of furnishing narcotics to a thirteen-year-old girl who was living in his home. He contends: (1) the trial court abused its discretion by admitting evidence of child pornography that was discovered on his computer and was not the basis for any of the charges; (2) the court should have instructed the jury sua sponte on the proper use of that evidence; (3) the case must be remanded because the court relied on facts that were not found true by the jury when it imposed an aggravated sentence on the principal count and ordered some of the remaining counts to run consecutively; and (4) the court ruled on a fact that was an element of the offense in imposing the upper term We Affirm.

FACTS

When she was 13 years old, Stephanie Z. moved into appellant's home. Appellant was 68 years old at the time and had been a family friend for several years. Stephanie's mother had a drug problem and was unable to provide a stable place for her daughter to live; she was staying with a boyfriend, but Stephanie and the boyfriend did not get along.

Appellant gave Stephanie methamphetamine to smoke almost every day. Soon after she moved in, he began molesting her on regular basis. He would usually touch her legs, breasts or vaginal area; on one occasion she awakened to find appellant performing oral sex on her. Stephanie generally resisted or protested. Appellant would stop when she told him to, although he often said that if he had not given her a place to stay, her mother would have had to give her up for adoption.

Appellant owned two computers and gave Stephanie his password so she could access pornographic sites. She viewed several of these sites when he was not present and saw, among other things, a graphic picture of two young girls on a bed. Appellant had Stephanie take naked photographs of herself with a camera attached to one of the computers.

Stephanie began seeing a boyfriend her own age, and appellant became jealous. On August 18, 2002, he and Stephanie signed a contract in which she promised to "love, honor, and ob[e]y Frank Marzac for this special . . . candlelight evening and smoke him out with most of my sack,[1] to be his faithful servant forever and ever and to look at no other man." Stephanie's mother found the contract when she was visiting the house one day and confronted appellant, who said Stephanie had written the note and liked to make things up. At about the same time, Stephanie told a cousin that appellant had a number of sexual objects in the house, such as dildos and pornographic videos.

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[1] Stephanie explained at trial that the reference to "smoking [appellant] out" referred to smoking methamphetamine.

Appellant wrote Stephanie a letter in which he stated, "It's okay to stay here until your mom shows up, but since all that stuff went down last week, I can't feel comfortable with you any more. I can't touch you anymore or sleep in the same bed with you. I thought I was going to jail for sure. Somebody else might turn me in if they heard what you were saying about me last week. It is very difficult for me to say this, but [it] would be better if your mom found a place for you to stay. You hurt me really bad, and the pain that's in my heart won't go away that soon. I feel betrayed. I feel hurt. All of the love you say you had for me turned out to be lies. I will really miss the closeness I felt with you. You will always be in my dreams, and I just can't reach out to you like I used to."

Stephanie was arrested for possessing a methamphetamine pipe. When her mother came to pick her up from the sheriff's station, she confronted her about the way she had changed, and Stephanie revealed that appellant had been molesting her. Stephanie's mother returned to the station to make a report of what had happened.

Authorities executed a search warrant on appellant's home and seized two computers. They found a number of sexually suggestive photographs in one of the computer's "recycle" bin. Also recovered from the computer were three movies containing child pornography.

Appellant was convicted of fourteen counts of lewd and lascivious conduct with a child under 14 (Pen. Code, § 288, subd. (a)), one count of oral copulation on a child under 14 (Pen. Code, § 288a, subd. (c)(1)), one count of furnishing a controlled substance to a minor (Health & Saf. Code, § 11353), fifteen counts of sexual exploitation of a child (Pen. Code, § 311.3, subd. (a)), and two counts of possessing child pornography (Pen. Code, § 311.11, subd. (a)). The court imposed an aggregate prison sentence of 20 years.

DISCUSSION

Admission of Pornographic Videotapes

Over defense objection, the prosecution's forensic computer expert testified that one of appellant's computers contained three pornographic videos. The videos were

not shown to the jury, but the expert explained that one of them depicted an adult male having sex with an eight-year-old girl and the others showed two young girls performing oral sex on each other. Appellant argues that the evidence was irrelevant and was inadmissible under Evidence Code sections 1101, 1108 and 352. We disagree.[2]

As relevant here, Evidence Code section 1101, subdivision (a) states, "Except as provided in this section and in Section[] . . . 1108 . . . , evidence of a person's character or a trait of his . . . character (whether in the form on an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b) allows evidence "that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . intent . . .) other than his or her disposition to commit such an act." Evidence Code section 1108 creates a statutory exception to section 1101's rule that evidence of other crimes or bad acts cannot be used to prove criminal disposition: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Appellant's possession of the pornographic videotapes was a specific instance of conduct that tended to show his bad character. It was relevant and admissible under Evidence Code section 1101, subdivision (b), because it tended to show that appellant had a sexual interest in children and that he acted with the requisite specific intent to give or obtain sexual gratification. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281.) The evidence was also admissible under Evidence Code section 1108, because it tended to prove appellant's disposition to commit sexual acts with children. (*Ibid*.)

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[2] The People argue that appellant has waived his challenges under Evidence Code sections 1108 and 352 because his counsel objected only on relevancy grounds when the evidence was admitted. We construe prior discussions between the court and counsel as sufficient to preserve the arguments he now makes.

Appellant contends that notwithstanding the arguable relevancy of the evidence under section 1108, the trial court should have excluded testimony about the videos as unduly prejudicial under section 352. We conclude there was no abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) The expert's testimony about the videos was relatively brief and the information he conveyed was not particularly inflammatory compared with the other evidence supporting the charges against appellant. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 660.) The jury was not shown the actual videos, further reducing the likelihood the jury would be unfairly influenced.

Appellant notes that visitors to his home had access to his computers, and complains that the prosecution did not establish that he was the person who had downloaded the videos. Appellant was free to make that argument to the jury, but for purposes of admissibility, the evidence supported the inference that the videos belonged to appellant. He was, after all, the owner of the computer on which they were found and the person with the greatest access to that computer.

Failure to Instruct on Evidence Code section 1108

Appellant argues that if the evidence of the videos found on his computer was admissible, the trial court should have given an instruction on the proper use of such evidence. He did not request such an instruction and the trial court was not required to give one sua sponte. (See *People v. Collie* (1981) 30 Cal.3d 43, 63; *People v. Jennings*, *supra*, 81 Cal.App.4th at pp.1317-1318.)

Blakely/Apprendi

At sentencing, the trial court considered a post-trial psychological evaluation of appellant in addition to the probation report. It indicated that while the case was not the worst it had seen, "the fact that [appellant] imposed himself on a person that was a child and a real victim, that really bothers me. Taking everything into consideration, his age as well, Dr. Sharma's report, which is very bothersome because there's no question in my mind based on the report and what I know that it can easily happen again. It's my intent to sentence [appellant] to 20 years in state prison. . . ." The

court then imposed the nine-year upper term for appellant's conviction of furnishing narcotics as well as consecutive terms of two years each (one-third the middle term) on five of the lewd conduct counts and the oral copulation count. Appellant argues that his sentence runs afoul of *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) because it was predicated on facts that were neither admitted by him nor found true by the jury. We reject the claim.

In *Apprendi, supra,* 530 U.S. 466, the court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely*, the court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra*, __ U.S. __ [124 S.Ct. at p. 2537].) In each case, state law established an ordinary sentencing range for the crime the defendant was convicted of committing, but allowed the court to impose a sentence in excess of that range if it determined the existence of specified facts not intrinsic to the crime. In each case, the Supreme Court held that a sentence in excess of the ordinary rage was unconstitutional because it was based on facts that were not admitted by the defendant or found true by the jury beyond a reasonable doubt.

Penal Code section 1170, subdivision (b) provides, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Penal Code section 669 directs the court to specify whether multiple sentences shall run consecutively or concurrently and provides that a sentence will be deemed to be concurrent when the trial court fails to so specify. California Rules of Court, rule 4.406(b)(5), requires a sentencing court to state reasons for making a determinate sentence consecutive rather than concurrent. Appellant contends that under this scheme, he was presumptively entitled to middle term concurrent sentences. He argues that under *Apprendi* and *Blakely*, the court may impose an upper term or

consecutive sentence only if each factor supporting the higher sentence was either admitted by him in open court or found true by the jury.

The California Supreme Court is currently considering whether *Apprendi* and *Blakely* apply to the imposition of upper term and consecutive sentences under the state's determinate sentencing law (DSL). (*People v. Towne*, review granted July 14, 2004, S125677.) The appellate courts that have considered these issues to date have rejected the argument that *Blakely* and *Apprendi* apply to consecutive sentencing decisions, but have split as to whether an upper term sentence must be based on jury findings, with the majority of courts agreeing that such findings are required. (Compare *People v. Picado* (2004) 123 Cal.App.4th 1216, rev. granted Jan. 19, 2005, S129826, with *People v. Juarez* (2004) 124 Cal.App.4th 56, rev. granted Jan. 19, 2005, S130032.) Review has been granted in almost all of the cases that have been published on these issues to date, and we anticipate that resolution by our Supreme Court will be forthcoming. Our sister courts have written exhaustively on the subject, and little can be accomplished by engaging in an extensive analysis here. We have thoroughly reviewed the opinions to date and have reached the following conclusions:

(1) *Apprendi* and *Blakely* do not apply to consecutive sentencing decisions under the DSL. Although a sentence will be deemed concurrent when the court does not specify how it shall run, there is no statutory preference for concurrent rather than consecutive terms. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) When the law permits a consecutive sentence, the court does not exceed the statutory maximum by imposing such a sentence.

(2) Although an argument to the contrary can be made, we are persuaded by those decisions which have held that *Blakely* does not preclude a sentencing court from imposing an upper term sentence based on aggravating factors that are not necessarily encompassed in the jury's verdict. In *Blakely,* the defendant pled guilty to second degree kidnapping with a firearm, which carried a "standard range" of 49 to 53 months imprisonment, but because the trial court found that the defendant had acted with "deliberate cruelty," it imposed an "exceptional sentence" of 90 months. The Supreme

Court concluded the sentence violated the defendant's Sixth Amendment right to a jury trial because it exceeded the 53-month maximum sentence under the standard range, but it did not suggest that the court was barred from making factual determinations to select a sentence within the standard range. (*Blakely, supra*, __ U.S. __ [124 S.Ct. 2531].) Under California's tripartite sentencing scheme, which provides for an upper, middle and lower term for most offenses, the upper term is the statutory maximum, akin to the 53-month maximum in *Blakely*.

The upper term is not rendered an extraordinary sentence merely because the court must impose the middle term unless there are factors in aggravation. Although there is language in *Blakely* which, if taken out of context, would preclude the court from relying on any factor not found true by the jury, *Blakely* did not eliminate judicial discretion or judicial fact finding for the purpose of selecting a sentence within the permissible range. In *United States v. Booker* (Jan. 12, 2005, No. 04-104) __ U.S. __ [2005 WL 50108], the Supreme Court reversed the defendant's sentence under the federal sentencing guidelines and concluded that the guidelines were unconstitutional under *Apprendi* and *Blakely* if they were given mandatory effect. But the court reaffirmed the constitutionality of a discretionary sentencing scheme in which the sentencing court makes factual determinations in order to select a term from within a range of sentences: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (*Booker, supra,* __ U.S.__ at p. __ [2005 WL 50108 at p. *8].)

The DSL requires the trial court to exercise its discretion to select from a range of three possible sentences. The Rules of Court provide guidance by enumerating facts relevant to the sentencing decision, but they do not make any particular sentence

mandatory assuming such facts are found. Section 1170, subdivision (b) simply precludes the imposition of an upper term sentence where there are no factors in aggravation, a provision which operates in the defendant's favor and does not increase the statutory maximum for a particular crime.

Statement of Reasons—Upper Term Sentence

Appellant alternatively argues that the court improperly relied on the victim's age when imposing the upper term on the count of furnishing narcotics to a minor. He correctly observes that the age of the victim was an element of the offense, and that elements cannot be used to aggravate a sentence under the rules of court. (Cal. Rules of Court, rule 4.420(d).)

Appellant did not object to the sentence on this ground and has waived the claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 356.) We would also reject the argument on its merits. Although the court referred to the victim's age when imposing the upper term, it did so in the context of noting that she was a "child and a real victim." This suggests the court was less concerned with her age per se than with the egregious breach of trust involved when an adult takes advantage of a troubled and vulnerable youth while being charged with her care and well-being. The court also cited appellant's likeliness to reoffend as a circumstance supporting the upper term, rendering harmless the court's reliance on the victim's age. (*People v. Levesque* (1995) 35 Cal.App.4th 530, 547-548.)

Correction of Abstract

The People note that the abstract of judgment erroneously describes the crimes underlying counts 2 and 10 as sexual exploitation of a minor and attempted oral copulation, respectively, when appellant was actually convicted of lewd conduct and oral copulation on those counts. The trial court should correct these errors when it issues its amended abstract of judgment to reflect the sentence imposed on resentencing.

DISPOSITION

The clerk of the court shall amend the abstract of judgment to accurately describe the crimes underlying counts 2 and 10, and shall forward a copy of the amended abstract to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Daniel Solis Pratt, Judge

Superior Court County of Los Angeles

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